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No. _____

IN THE

Supreme Court of the United States

R.J. REYNOLDS TOBACCO COMPANY
and BROWN & WILLIAMSON HOLDINGS, INC.,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The decision below, for the first time ever, extended the federal fraud statutes to reach public policy opinions, and even *Noerr-Pennington* speech directly seeking to affect government regulation, and further imposed liability without any allegation or finding that *any* of Defendants' agents had a specific intent to defraud. In so doing, it contravened the First Amendment, the Due Process Clause, and the fraud and RICO statutes in ways that conflict with the decisions of this Court and numerous other circuits.

The questions presented are:

(1) Whether the fraud statutes, the First Amendment, and Due Process permit deeming speech fraudulent where (a) the speech addressed important public controversies and potential regulation, rather than being designed to deprive consumers of money or property; (b) there was no evidence or finding that the speech was material to a reasonable consumer; (c) the speech constituted opinions regarding ongoing scientific disputes or statements that were undisputedly true under at least one reasonable interpretation; (d) there was no allegation or finding that any individual associated with Defendants said anything they believed to be false or possessed specific intent to defraud; and (e) much of the speech is concededly subject to full *Noerr-Pennington* protection.

(2) Whether the court below erred by failing independently to review the facts relating to the constitutional protection of Defendants' speech, in contravention of *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485 (1984).

(3) Whether the court below erroneously imposed liability for "light" and "low-tar" cigarette descriptors, where (a) such descriptors undisputedly accurately summarized tar and nicotine levels measured by the Cambridge Filter Method, and (b) the FTC *approved* statements of Cambridge Method results during the relevant period.

(4) Whether the court below erred in imposing a "corrective statements" remedy wholly unconnected to any future advertising and imposed in noncommercial fora.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioners in this case are R.J. Reynolds Tobacco Company and Brown & Williamson Holdings, Inc. Petitioner R.J. Reynolds Tobacco Company is directly and wholly owned by R.J. Reynolds Tobacco Holdings, Inc. (a Delaware Corporation). R.J. Reynolds Tobacco Holdings, Inc. is a direct wholly owned subsidiary of Reynolds American Inc., a publicly traded corporation. Petitioner Brown & Williamson Holdings, Inc. owns more than 10% of the common stock of Reynolds American Inc. Petitioner Brown & Williamson Holdings, Inc. is an indirect, wholly owned subsidiary of British American Tobacco p.l.c., and no other publicly held company owns 10% or more of its stock.

Respondent is the United States of America.

In addition to Petitioners, Defendants-Appellants/Cross-Appellees below were: Philip Morris USA Inc.; Altria Group, Inc.; Lorillard Tobacco Company; British American Tobacco (Investments) Ltd.; The Council for Tobacco-Research-U.S.A., Inc.; and The Tobacco Institute.

Intervenors-Appellees/Cross-Appellants below were: Tobacco-Free Kids Action Fund; American Cancer Society; American Heart Association; American Lung Association; Americans for Nonsmokers' Rights; and National African American Tobacco Prevention Network.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners R.J. Reynolds Tobacco Co. ("RJR") and Brown & Williamson Holdings, Inc. ("B&W") respectfully submit this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The court of appeals' opinion is reported at 566 F.3d 1095. Pet. App. 1a.[1] The order denying Defendants' petition for rehearing or rehearing en banc is unreported. *Id.* at 2182a, 2184a. The opinion of the United States District Court for the District of Columbia is reported at 449 F. Supp. 2d 1. *Id.* at 101a.

JURISDICTION

The court of appeals filed its opinion on May 22, 2009. It denied Defendants' timely petition for rehearing or rehearing en banc, and a related suggestion of mootness, on September 22, 2009. On November 10, 2009, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including February 19, 2010. No. 09A443. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the U.S. Constitution provides, in relevant part:

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[1] The Appendix to Petitions for Writs of Certiorari is cited as "Pet. App." RJR's individual appendix is cited as "RJR Pet. App." All emphasis herein is added unless otherwise indicated.

> Congress shall make no law ... abridging the freedom of speech ....

The relevant provisions of the federal mail and wire fraud statutes, 18 U.S.C. §§ 1341, 1343, and the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 *et seq.*, are set forth in the appendix to this petition.

STATEMENT

The facts of the case are set out fully in the petitions by Philip Morris USA Inc. ("PM") and Lorillard Tobacco Company; to avoid redundancy, Petitioners here summarize only the essential facts. In 1999, the government brought this RICO case, seeking remedies under 18 U.S.C. § 1964(a). It alleged that Defendants, as part of an association-in-fact enterprise, had committed the "predicate acts" of mail and wire fraud by defrauding consumers through a variety of fraudulent statements. Pet. App. 6a-8a. The nine-month trial began in September 2004, during which hundreds of witnesses provided testimony and thousands of exhibits were introduced. During the trial, the D.C. Circuit ruled, in an interlocutory appeal, that section 1964(a) does not authorize the remedy of disgorgement, because it is aimed at remedying past misconduct rather than "prevent[ing] and restrain[ing]" future misconduct, as required by section 1964(a). *See United States v. Philip Morris USA Inc.*, 396 F.3d 1190 (D.C. Cir.), *cert. denied* 546 U.S. 960 (2005).

At trial, the government disclaimed *any* attempt to prove that *any* individual corporate agent acted with specific intent. Its opening statement argued that the speaker's intent was "immaterial" because

specific intent could be proven through Defendants' "collective knowledge":

> [W]e are not going to focus on evidence that [a] particular representative knew or believed [a] statement to be false because that's immaterial. Rather, the government's proof will rest on the collective knowledge of the defendants' corporations' officers, employees, agents and representatives.

RJR Pet. App. 43a. The government's pre-trial brief similarly announced that the government would try to prove only "collective" corporate intent because "corporate knowledge should be aggregated," and knowledge is "imputed to the corporation-principal." *Id.* at 32a. The government *never* attempted to prove at trial that any individual acted with a specific fraudulent intent.

The district court issued a lengthy opinion (the facts taken virtually verbatim from the government's pleadings) holding Defendants liable and imposing numerous injunctive remedies. Pet. App. 101a-2181a. The district court found that Defendants engaged in a purported scheme to defraud by, *inter alia*, falsely (1) denying harmful effects of smoking on health, (2) denying that nicotine is addictive, (3) denying that secondhand smoke causes disease, (4) representing, through "light" or "low-tar" descriptors, that the designated cigarettes were healthier than other cigarettes, and (5) denying manipulation of nicotine levels in cigarettes. *Id.* at 12a-13a.

Following the government's lead, the district court did not make *any* finding that *any* agent or employee of *any* Defendant acted with specific intent. It

instead adopted the government's collective corporate intent standard, stating at least six times that its specific intent finding was based on the "collective knowledge of each Defendant and of the Enterprise as a whole," *not* "by looking at [the] individual corporate agent." *Id.* at 1972a, 1978a, 1980a-82a, 1985a.

The district court found that Defendants committed fraud by denying that cigarettes are "addictive." *Id.* at 1901a. But Defendants were simply publicly resisting the Surgeon General's 1988 decision to concededly *redefine* "addiction" to cover tobacco. *Id.* at 505a-06a. Nor, contrary to the D.C. Circuit's revisionist history, was there any allegation or finding that Defendants committed fraud by denying tobacco "dependence." *Id.* at 1897a-1901a. Moreover, "'[p]hysical dependence' and 'withdrawal' are generally considered equivalent concepts," *id.* at 1899a n.50, and it is clear that Defendants' discussion of tobacco's withdrawal symptoms were *the same* as the government's, *see id.* at 496a-497a, 520a-521a, 1900a.

Similarly, the district court found that denials of secondhand smoke's harmfulness were fraudulent, even though this is opinion, and one shared by very reputable scientists after the Surgeon General *first* suggested such harm in 1986. Pet. App. 50a. There was no finding or evidence that Defendants had some knowledge on this topic superior to that of the public health community. The court also found fraudulent "descriptors" like "light" or "low-tar," Pet. App. 972a-988a, even though they accurately summarized tar measurements under a method—the Cambridge

Filter Method—endorsed by the Federal Trade Commission, *id.* at 47a.

A panel of the D.C. Circuit affirmed both the district court's liability determination and its remedial order in substantial part. *Id.* at 1a-100a.

REASONS FOR GRANTING THE PETITION

I. THIS CASE IS EXCEPTIONALLY IMPORTANT BECAUSE IT PRESENTS AN UNPRECEDENTED DISTORTION OF THE FRAUD STATUTES TO PUNISH THE SPEECH OF ONE SIDE OF A PUBLIC DEBATE

Before this case, Congress and the courts have ensured that the federal fraud statutes reached only speech where the government has *proved* that the speaker *knowingly* made a *false* statement of *material fact* with the *specific intent* to deprive the listener *of money or property*. *See infra* Part II. Consequently, those statutes satisfy the First Amendment because they implicate only statements the speaker knows to be untrue (or whose truth he recklessly disregards) and only commercial speech directly related to "propos[ing] a commercial transaction." *United States v. United Foods, Inc.*, 533 U.S. 405, 409 (2001).[2]

Yet, in a stark departure from the clear holdings of the other circuits, the D.C. Circuit eliminated each of those limitations on the fraud statutes, which were

[2] Obviously, some fraud does not involve consumer transactions at all, such as "honest services" fraud, 18 U.S.C. § 1346, or lying to federal officers, *id.* § 1001, so those provisions are not implicated here (and are constitutional because they involve only knowingly false, injurious speech unrelated to public policy opinions).

mandated by this Court's precedent and basic requirements of the First Amendment. Specifically, the panel found that Defendants had violated these statutes, punishable with criminal sanctions, even though (1) there was no finding that the penalized statements were intended to deprive consumers of money or property; (2) there was not a scintilla of evidence that the allegedly fraudulent statements were material, *i.e.*, "important to a reasonable person purchasing cigarettes," Pet. App. 42a; (3) the statements at issue concerned opinions about ongoing scientific controversies and public regulation, rather than objectively verifiable *facts*; and (4) the district court did not find, and the government affirmatively said it would not seek to prove, that a *single* individual had the specific intent to defraud or made a single statement the individual thought was untrue. Every one of these four deficiencies would have doomed the case in at least three other circuits.

By eliminating these safeguards, the panel converted statutes reaching only knowing or reckless falsehoods made with both the purpose and likely effect of fraudulently inducing commercial transactions into laws punishing—indeed, criminalizing—opinions about important public health or regulatory controversies, if the industry statements conflict with those of public health agencies. This is the first case anywhere that extended the fraud statutes to reach industry or company statements about matters of public concern. The government itself has warned of the constitutional invalidity of "fraud" statutes failing to ensure "substantial protection for speech, even by a corporation, that does not injure individuals or materially affect [consumer] purchasing decisions."

Brief for United States as *Amicus Curiae* Supporting Petitioners at 9, *Nike, Inc. v. Kasky*, 539 U.S. 654 (2003) (No. 02-575).

Therefore, this case directly presents the issues that this Court decided to review in *Nike* and *Illinois ex rel. Madigan v. Telemarketing Associates, Inc.*., 538 U.S. 600 (2003): *i.e.*, the extent to which statutes and government lawsuits designed to preclude "consumer fraud" may infringe free speech. The Court's guidance in this sensitive, complex area is particularly critical because *Nike* was dismissed as improvidently granted, because the civil fraud prosecution here lacks each of the speech safeguards *Madigan* identified as important (if not essential), and because the panel's decision conflicts with other circuits' interpretations of fraud statutes.

In this regard, it bears emphasis that it is undisputed that the vast majority of speech punished here (except that concerning "light" descriptors) was noncommercial speech about important public controversies. Defendants' speech, in short, was an exercise of their "right to discuss freely industrial relations which are matters of public concern," which the government may not "impair." *Thornhill v. Alabama*, 310 U.S. 88, 104 (1940); *see also Roth v. United States*, 354 U.S. 476, 485 (1957). Indeed, because a substantial subset of the speech was seeking to affect legislative and executive tobacco regulation, it was protected under the *Noerr-Pennington* doctrine as an "'attempt[] to persuade the legislature or the executive to take particular action with respect to a law,'" Pet. App. 44a (quoting *E. R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 136 (1961)), or to otherwise "genuinely

seek[] to achieve [a] governmental result," *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 507 n.10 (1988) (internal quotation marks omitted). At a minimum, the noncommercial speech was "inextricably intertwined" with any commercial speech. Pet. App. 87a. Accordingly, as this Court ruled in a case involving *direct solicitations* of money, *all* the speech must be treated as "fully protected expression." *Riley v. Nat'l Fed'n of the Blind of N. C., Inc.*, 487 U.S. 781, 796 (1988); *see also Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 255 (2002) ("The Government may not suppress lawful speech as the means to suppress unlawful speech."); *Thomas v. Collins*, 327 U.S. 516, 534-35 (1945) (invalidating ban on union solicitation because all such speech is "blanket[ed] with uncertainty [concerning] whatever may be said" and speakers are thus "compel[led] ... to hedge and trim ... every word").

The panel's only justification for permanently enjoining Defendants' discussions of smoking-related public controversies and regulation was the conclusory assertion that "[n]either the *Noerr-Pennington* doctrine nor the First Amendment more generally protects [speech] predicated on fraud." Pet. App. 44a (internal quotation marks omitted). But, in addition to the fact that the *Noerr-Pennington* doctrine *does* protect some fraud, as this Court and numerous other circuits have held, *see infra* at 17-18, the *reason* that the "First Amendment does not [otherwise] protect fraud," Pet. App. 43a (citing *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 357 (1995)), is because the fraud statutes reach only knowing or recklessly false speech intended and likely to deprive consumers of property—*i.e.*, intentionally deceptive commercial speech—not

public policy speech where there is no finding that any agent of Defendants said anything it did not believe. And, here, not only did the panel eliminate those substantive requirements, *see infra* Parts II.B.1-4, but it also procedurally failed to exercise an "independent examination" of the record, which this Court and numerous other circuits have held is an essential First Amendment safeguard, *see infra* Part II.B.5. Accordingly, the panel's platitudes about fraud cannot begin to justify the suppression of speech here.

In sum, under the panel's regime, the government can successfully prosecute under RICO and/or the fraud statutes any industry that offers views on the health and environmental effects of its products, or regulation of those products, if a single district court, subject only to "clearly erroneous" review, deems those views contrary to a "scientific consensus," based only on internal corporate memos agreeing with the "consensus," but without finding that the speakers agreed with those memos, or that the statements are likely or intended to affect consumers' purchasing decisions.

Thus, just as this suit was initiated by President Clinton at his State of the Union Address, *see* Elena Kagan, *Presidential Administration*, 114 Harv. L. Rev. 2245, 2358 n.423 (2001) (raising "serious questions about presidential direction of decisions to file suit against discrete entities such as ... the tobacco industry"), another politically motivated President can convict energy and transportation companies for "fraudulently deceiving" citizens about their products' effects on "global warming," if their statements dare to clash with "consensus" views.

See, e.g., Andrew C. Revkin, "On Climate Issue, Industry Ignored Its Scientists," *N.Y. Times*, Apr. 24, 2009, at A1 (reporting that "a group representing industries with profits tied to fossil fuels[] led an aggressive lobbying and public relations campaign against the idea that emissions of heat-trapping gases could lead to global warming" contrary to "its own scientific and technical experts"). That threat is already materializing. *See* Complaint at ¶ 5, *Native Village of Kivalina v. ExxonMobil Corp.*, No. CV-08-01138 SBA (N.D. Cal. Feb. 26, 2008), 2008 WL 594713 (complaint against energy companies regarding global warming); *Native Village of Kivalina v. ExxonMobil Corp.*, No. CV-08-01138 SBA, ___ F. Supp. 2d ___, 2009 WL 3326113, at *15 (N.D. Cal. Sept. 30, 2009) (dismissing complaint, but appeal pending).

This attack on public-policy viewpoints not only chills participation in the marketplace of ideas by knowledgeable parties, but *skews* that marketplace by chilling only one side of the debate. *See, e.g.*, *Nike*, 539 U.S. at 680 (Breyer, J., dissenting) (noting "concern that the commercial speaker engaging in public debate suffers a handicap that noncommercial opponents do not"); *Citizens United v. FEC*, No. 08-205, slip. op. at 38-39 (2010) ("By suppressing the speech of manifold corporations, ... the Government prevents their voices and viewpoints from reaching the public ...."); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 392 (1992). Such a dangerous expansion of the fraud statutes to ensnare public policy and core political speech without any finding that the individual speaker thought it was false requires this Court's review, particularly since the federal government can bring virtually all such actions

against controversial and unpopular industries in the D.C. Circuit. *See* 18 U.S.C. § 1965(a) & (b).

II. THE PANEL IGNORED NUMEROUS REQUIREMENTS OF THE FRAUD STATUTES AND THE FIRST AMENDMENT, IN CONFLICT WITH DECISIONS OF THIS COURT AND OTHER CIRCUITS

A. The First Amendment Informs And Cabins The Law Of Fraud

This Court has placed crucial "limits on the policing of fraud when it cuts too far into other protected speech." *United States v. Williams*, 128 S.Ct. 1830, 1851 n.2 (2008) (Souter, J., dissenting); *see, e.g., Madigan*, 538 U.S. at 620; *Riley*, 487 U.S. at 787-795. Specifically, the following aspects of fraud law prevent it from unduly burdening First Amendment rights.

First, the fraud laws only reach harmful speech of no value. In consumer-fraud cases like this one, the statutes reach only speech that both (1) is intended "'to deprive [consumers] of their money or property,'" *see, e.g., Cleveland v. United States*, 531 U.S. 12, 18-19 (2000) (quoting *McNally v. United States*, 483 U.S. 350, 356 (1987)), and (2) is likely to do so because material to consumers' purchasing decisions, *see, e.g., Neder v. United States*, 527 U.S. 1, 22-23 (1999). As a result of the "money or property" and "materiality" requirements, the fraud laws reach only commercial speech that "does no more than propose a commercial transaction" and only speech that is objectively harmful, because likely to cause injury. *See United Foods*, 533 U.S. at 409; *Bd. of Trustees v. Fox*, 492 U.S. 469, 473-474 (1989); *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 561 (1980).

As the government itself noted in *Nike*, traditional fraud poses no "risk of chilling protected expression" because it "is directed at what is essentially conduct—the inducement and execution of a purchase or sale—rather than the content of the speech itself." *See* Brief for United States at 13. It is the government's "power to regulate commercial transactions [which] justifies its concomitant power to regulate commercial speech that is 'linked inextricably' to those transactions." *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 499 (1996) (plurality opinion).

Second, federal fraud statutes reach only statements of fact that are unequivocally false. Thus, "[e]xpressions of opinion, scientific judgments, or statements as to conclusions about which reasonable minds may differ cannot be false." *See, e.g., United States ex rel. Morton v. A Plus Benefits, Inc.*, 139 F. App'x 980, 983 (10th Cir. 2005) (internal quotation marks omitted) (False Claims Act); *see also Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-40 (1974) ("However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas."). Likewise, and also reflective of the rule of lenity, federal fraud statutes do not reach semantic ambiguities—statements that could be false under *one* interpretation but not another—because the government "bears the burden to negate any reasonable interpretations that would make a defendant's statement factually correct." *See, e.g., United States v. Migliaccio*, 34 F.3d 1517, 1525 (10th Cir. 1994); *see also Leocal v. Ashcroft*, 543 U.S. 1, 11 n.8 (2004) (if statute has "both criminal and

noncriminal applications ..., the rule of lenity applies").

Third, the fraud statutes also have a strict *scienter* requirement, which, like defamation actions against public officials, reaches only knowing or reckless falsehoods. *See, e.g.*, *United States v. King*, 257 F.3d 1013, 1021 (9th Cir. 2001); *Irwin v. United States*, 338 F.2d 770, 774 (9th Cir. 1964); *cf. Madigan*, 538 U.S. at 620; *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 502 & n.19 (1984) (noting "kinship" between actual malice standard for public defamation and "motivation that must be proved to support a common law action for deceit"). Since "erroneous statement[s]" are "inevitable in free debate," *Gertz*, 418 U.S. at 340, this *scienter* requirement would be essential to provide the "breathing space" required by the First Amendment if the fraud statutes did apply to discussions of public issues. *See N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964); *Madigan*, 538 U.S. at 620; *Gertz*, 418 U.S. at 340.

Finally, fraud allegations are subject to rigorous judicial review and evidentiary requirements. "Exacting proof requirements" are placed on the government and the judiciary must carefully scrutinize and precisely tailor the speech being attacked. *See, e.g.*, *Madigan*, 538 U.S. at 620. This "Court has long cautioned that, to avoid chilling protected speech, the government must bear the burden of proving that the speech it seeks to prohibit is unprotected" and the "government shoulders that burden in a fraud action." *Id.* at 620 n.9. Thus, "of prime importance" to the constitutional validity of the fraud statutes is that, "in a properly tailored

fraud action the State bears the full burden of proof" on every element of fraud. *Id.* at 620. Furthermore, and particularly where, as here, noncommercial speech is implicated, "*de novo* appellate review of findings regarding actual malice" is required. *Id.* at 621 (citing *Bose*, 466 U.S. at 498-511). Indeed, in *Bose*, this Court carefully reviewed and overturned a district court finding concerning whether a false statement was made with reckless disregard in a case involving speech (review of a loudspeaker system) of far less public importance than that outlawed here. 466 U.S. at 487-88.

B. The Panel Eviscerated All Of These Essential Requirements Of Fraud Actions

In order to hold Defendants liable, the panel was forced: (1) to expand the scope of the ensnared speech to concededly noncommercial speech and *Noerr-Pennington* speech not intended or likely to deprive consumers of money; (2) to find Defendants' speech to be material even though the government concededly offered no proof thereof; (3) to base liability upon statements of opinion and semantic ambiguities; (4) to find individualized specific intent even though the government had affirmatively disavowed attempting to prove this essential element (and the district court had made no particularized findings); and (5) to decline to exercise independent appellate review. This misapplication of the fraud statutes is in irreconcilable conflict with the practice of lower courts and this Court, and renders it violative of the First Amendment.

1. Money or Property: Neither court below disputed that most of the allegedly "fraudulent" speech was *not* designed to deprive consumers of

money or property, although this Court and the lower courts have made clear that—apart from honest-services fraud not applicable here—the mail and wire fraud statutes reach only such speech. *See Cleveland*, 531 U.S. at 26; *see also United States v. Ratcliff*, 488 F.3d 639, 645-46 (5th Cir. 2007); *United States v. Turner*, 465 F.3d 667, 680 (6th Cir. 2006); *United States v. Lew*, 875 F.2d 219, 222 (9th Cir. 1989).

Indeed, the district court's own findings plainly establish that the "fraudulent" speech was not directed to consumers, but was about important public controversies or designed to forestall public regulation and hostility. For example, the court found that Defendants' statements denying that secondhand smoke causes disease were done because Defendants feared "government regulation to restrict smoking in public places," Pet. App. 1540a, and were designed to "avoid adverse findings by government agencies, and forestall indoor air restrictions," *id.* at 1541a; *see also id.* at 1604a (statements directed at a "ban on smoking in public gathering places [or] providing separate facilities"); *id.* at 1605a (secondhand smoke is industry's "biggest public/political issue").

Similarly, virtually all of the condemned "addiction" statements were directly related to the Surgeon General's 1988 decision to concededly *redefine* "addiction" or news stories on that policy dispute with the government. *See, e.g.*, *id.* at 654a-56a. Indeed, the district court found that, prior to that 1988 report, "[t]obacco industry statements deal[t] only sparsely with the issue of addiction." *Id.* at 630a; *see also id.* at 555a ("'Addiction' has received

little industry research attention."). Similarly, *every* one of the five predicate acts related to alleged nicotine manipulation were answers to hostile questions at a 1994 congressional hearing—the very same hearing that the lower courts found was immunized under *Noerr-Pennington* (with respect to Defendants' answers on "addiction"). Moreover, all such "fraudulent" statements were in response to various accusations by public health authorities. *Id.* at 857a-61a, 1962a-63a.

More generally, 98.9% of the "fraudulent" public statements identified by the district court (again, excluding "lights") were not product advertisements, but op-ed pieces, congressional testimony and the like;[3] approximately 82% were purely internal documents which were never *seen* by consumers. *See id.* at 373a-1855a; *see also id.* at 1980a ("[M]any of the fraudulent, deceptive, and misleading statements were issued as press releases, paid newspaper statements, pamphlets, and similar documents."). Thus, the "circumstances of format, content, and regulatory context" all establish that the speech here is not remotely like other "forms of commercial speech, such as simple product advertisements, that [the Court has] reviewed" in commercial speech cases. *Nike*, 539 U.S. at 678-79 (Breyer, J., dissenting).

Thus, this is plainly not speech directed at consumers. Indeed, two of the examples the D.C. Circuit particularly highlighted as fraudulent falsehoods were taken from a *deposition* and testimony at *this trial*. Pet. App. 39a-40a. Rather,

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[3] Only 5 of the 451 (1.1%) of the public "fraud" statements were in product advertisements.

the "fraud" here consists of the government and public health authorities making critical accusations, implicitly or explicitly demanding responses from Defendants and then labeling their denials "fraud"—thus depriving Defendants "of their right to petition in the very instances in which that right may be of the most importance to them." *Noerr*, 365 U.S. at 139.

Moreover, not only did the extension of the fraud statutes to *Noerr-Pennington* speech override the statutes' "money or property" requirement, the decision below also reduced the constitutional protection given to such speech. Specifically, contrary to the panel's holding, *Noerr-Pennington does* protect speech "predicated on fraud." Pet. App. 44a. As this Court has noted, a "publicity campaign directed at the general public, seeking legislation or executive action, enjoys [statutory] immunity, even when the campaign employs unethical and deceptive methods." *Allied Tube*, 486 U.S. at 499-500. Indeed, in *Noerr* itself, the defendant's conduct fell "far short of the ethical standards generally approved in this country," including planting misleading newspaper and magazine articles, generating biased research results that falsely appeared to emanate from independent sources, and distorting empirical data to slant conclusions in their favor. 365 U.S. at 140; *see also Noerr Motor Freight, Inc. v. E. R.R. Presidents Conference*, 155 F. Supp. 768, 774-816 (E.D. Pa. 1957). Thus, just as knowingly false statements *about* government agencies are immunized by the First Amendment, *N.Y. Times*, 376 U.S. at 291, so are deceptive efforts to influence those agencies in the rough-and-tumble marketplace of ideas, *Noerr*, 365 U.S. at 140; *see also* Charles Fried, *The New*

First Amendment Jurisprudence: A Threat To Liberty, 59 U. Chi. L. Rev. 225, 238 (1992). It consequently is no surprise that the panel's holding contravenes those of at least five other circuits. *See Davric Me. Corp. v. Rancourt*, 216 F.3d 143, 147 (1st Cir. 2000); *Armstrong Surgical Ctr., Inc. v. Armstrong County Mem'l Hosp.*, 185 F.3d 154, 160 (3d Cir. 1999); *Boone v. Redevelopment Agency*, 841 F.2d 886, 894 (9th Cir. 1988); *First Am. Title Co. of S.D. v. S.D. Land Title Ass'n*, 714 F.2d 1439, 1447 (8th Cir. 1983), *abrogated in other respects*, *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365 (1991); *Metro Cable Co. v. CATV of Rockford, Inc.*, 516 F.2d 220, 231 (7th Cir. 1975). Some circuits have suggested that, at most, *Noerr-Pennington* does not protect false petitions in the *quasi-adjudicative* process because "misrepresentations, *condoned in the political arena*, are not immunized ... in the adjudicatory process," *Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 513 (1972). *See, e.g.*, *Baltimore Scrap Corp. v. David J. Joseph Co.*, 237 F.3d 394, 401-02 (4th Cir. 2001); *Kottle v. Nw. Kidney Ctrs.*, 146 F.3d 1056, 1061 (9th Cir. 1998).

2. Materiality: Even if the speech here had been *directed* at consumers, it would still be beyond the reach of the fraud statutes because there is not a scintilla of evidence or any district court finding that any of the challenged statements (excluding "lights") were "important to a reasonable person purchasing cigarettes." Pet. App. 42a. Instead (except for "lights" descriptors), the appeals court found the materiality requirement satisfied based *solely* on its own counterintuitive *hunches* as to what consumers would likely find important (or even know about):

e.g., that consumers purportedly think it important to their purchasing decisions whether nicotine occurs naturally or because Defendants "manipulated ... nicotine delivery"; whether tobacco's conceded withdrawal effects are labeled "addictive" or something else; or whether Defendants *internally* "destroyed documents." *Id.* at 42a-43a.[4]

The panel's unsubstantiated "findings" concerning these alleged fraudulent schemes thus conflict with other circuits' rulings requiring plaintiffs to *prove* materiality—just like every other element of fraud. *See, e.g.*, *United States v. Goodman*, 984 F.2d 235, 237, 239 (8th Cir. 1993) (false statements were not "reasonably calculated to deceive persons of ordinary prudence" and criticizing United States for attempting to make "[c]riminal fraud ... turn on semantical phrases"); *Assocs. In Adolescent Psychiatry, S.C. v. Home Life Ins. Co.*, 941 F.2d 561, 571 (7th Cir. 1991); *Blount Fin. Servs., Inc. v. Walter E. Heller & Co.*, 819 F.2d 151, 153 (6th Cir. 1987); *see also Madigan*, 538 U.S. at 620.

Although statements on the effect of smoking on a smoker's health would be relevant to consumers, Defendants' long-ceased statements on this subject were immaterial under the law of other circuits, because every cigarette package has contained health warnings for over 40 years and virtually all of the public is fully aware of these health effects. Indeed,

[4] The district court made no specific findings on the statements' materiality because it erroneously found that "materiality" could be satisfied even for statements that no reasonable person would find important, Pet. App. 1986a-87a, and because Defendants "spen[t] millions of dollars in advertising" (even though the non-lights "fraud" was wholly unrelated to such advertising), *id.*

96% of teenagers in 1977 believed that smoking caused adverse health effects, and 99% of the public today know that smoking causes lung cancer—20% more than know that the earth revolves around the sun (79%). RJR Pet. App. 48a-49a, 50a-51a. Consequently, the statements are not material because no "reasonable [consumer] would be misled" by Defendants' long-ceased statements "when the truth is under his nose in black and white (many times over)." *Assocs. in Adolescent Psychiatry*, 941 F.2d at 571; *see also Blount Fin. Servs.*, 819 F.2d at 153. The D.C. Circuit's contrary holding, Pet. App. 43a, conflicts with these circuits and is wrong because materiality turns on what a "*reasonable*" person would find important.[5]

3. False Facts: As noted, numerous circuits have held, consistent with this Court's jurisprudence, that the fraud statutes cover *only false factual* statements, not opinions on "one side of a ... scientific dispute," *see, e.g.*, *Luckey v. Baxter Healthcare Corp.*, 183 F.3d 730, 733 (7th Cir. 1999),[6] or semantic ambiguities that are plainly true under one "reasonable interpretation[]" of the contested statement, *see, e.g.*, *Migliaccio*, 34 F.3d at 1525.[7] Yet

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[5] The overwhelming public knowledge of smoking's health effects also plainly eliminates any conceivable justification for a "corrective statements" remedy. *See infra* Part IV.

[6] *See also United States ex rel. Wilson v. Kellogg Brown & Root, Inc.*, 525 F.3d 370, 376 (4th Cir. 2008); *A Plus Benefits, Inc.*, 139 F. App'x at 983; *United States v. Gay*, 967 F.2d 322, 329 (9th Cir. 1992); *United States v. Shelton*, 669 F.2d 446, 465 (7th Cir. 1982).

[7] *See also Kellogg Brown & Root*, 525 F.3d at 376; *United States v. Gatewood*, 173 F.3d 983, 988 (6th Cir. 1999); *United States v.*

the panel based Defendants' fraud liability on precisely such disputed opinions and semantic ambiguities.

For example, Defendants' statements that the scientific evidence did not conclusively show that secondhand smoke causes disease constitute a classic opinion in an ongoing scientific and political debate. Yet Defendants' statements concerning this issue were found fraudulent, Pet. App. 1888a-89a, even though the statements merely echoed very respectable "post-1986 scientific opinions casting doubt on the dangers of secondhand smoke," Pet. App. 50a; *see also Flue-Cured Tobacco Coop. Stabilization Corp. v. EPA*, 4 F. Supp. 2d 435, 464 (M.D.N.C. 1998) (overturning EPA findings on secondhand smoke because, *inter alia*, EPA's own "methodology and its selected studies ... did not demonstrate a statistically significant association between [second-hand smoke] and lung cancer"), *vacated on other grounds*, 313 F.3d 852 (4th Cir. 2002). These respectable opinions, which were indisputably non-fraudulent if said by others, were nonetheless held impermissible when proffered by Defendants, because their "own knowledge" purportedly exceeded that of "others" in the scientific community, as purportedly evidenced by Defendants' knowledge "[i]n 1982" that sidestream smoke was "more irritating and/or toxic" than inhaled smoke and

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(continued...)

Rowe, 144 F.3d 15, 21 (1st Cir. 1998); *United States v. Bradstreet*, 135 F.3d 46, 52 (1st Cir. 1998); *United States v. Race*, 632 F.2d 1114, 1120 (4th Cir. 1980); *United States v. Steinhilber*, 484 F.2d 386, 390 (8th Cir. 1973); *United States v. Diogo*, 320 F.2d 898, 905-07 (2d Cir. 1963).

by their *comments* on *public* studies in the early 1980's. Pet. App. 51a. But this attempted end-run around the bar on proscribing opinion falters on the absence of evidence or finding by the district court that Defendants knew more about secondhand smoke than the scientific community. The Surgeon General knew all about sidestream smoke's toxicity in the early 1970s and 1980s, but was unable to find a link to disease until 1986. *See id.* at 1554a-55a (discussing 1982 SG Report); *id.* at 1556a (discussing 1986 SG Report); *see also* U.S. Dep't of Health & Human Servs., *The Health Consequences of Involuntary Smoking: A Report of the Surgeon General* (1986).

Likewise, Defendants' statements about "addiction" are a classic example of semantic ambiguity and disagreement, where Defendants merely advocated "retaining an earlier definition of addiction" limited to heroin-like drugs causing severe physical dependence, which the Surgeon General concededly altered in 1988 to include smoking. Pet. App. at 53a. The panel attempted to "render[] any supposed ambiguities in the word 'addiction' beside the point" by contending that Defendants had their "representatives testify that nicotine did not cause addiction *or dependence*," *id.* at 54a (internal quotation marks and citation omitted). The record plainly shows, however, that the government did not *allege* and the district court did not *find* that denying "dependence" was fraudulent, only denying smoking's *addictiveness* was purportedly fraud, *id.* at 1897a-1901a, and, in any event, Defendants' cited denial of "dependence" was in *1982 Tobacco Institute* congressional *testimony* fully consistent with the

Surgeon General's 1982 views, *id.* at 53a (citing *id.* at 494a-97a, 710a, 1897a-1901a).

4. Specific Intent: As noted, the panel justified its severe punishment of Defendants' public policy and petitioning speech solely on the grounds that Defendants "knew" the statements were false. Defendant corporations could "know" a statement was false, however, only if the human beings speaking for them knew they were false, so that such wrongful intent could be attributed to the corporations under *respondeat superior*. But there is not a *single* finding anywhere in the district court's voluminous opinion that anyone associated with Defendants said a single sentence they believed to be false and the government *affirmatively disavowed* from the outset any effort to prove that any "particular representative [of Defendants] knew or believed [a] statement to be false." RJR Pet. App. 43a. The government disdained such an effort because it viewed such individual intent as "*immaterial*," since the "government's proof will rest on the *collective* knowledge of the defendants' corporations' ... representatives," which can be "*imputed* to the corporation-principal." *See id.* at 32a, 43a.

Like the government, the district court repeatedly and expressly "rejected the theory of specific intent ... requiring that a corporate state of mind can only be established by looking at each individual corporate agent at the times s/he acted" because that would "create an insurmountable burden for a plaintiff in corporate ... fraud cases and frustrate the purposes of the statute." Pet. App. 1982a; *see also id.* at 1973a, 1979a, 1985a. It found that corporate *collective*

intent satisfied the specific intent requirement because "knowledge of agents" may be "*imputed* to the corporation" and "can be *inferred* from the *collective* knowledge of each defendant *company* itself and the reckless disregard of that knowledge." *See id.* at 1582a, 1977a.

The D.C. Circuit was "dubious" of the district court's holding that it could simply *impute* contradictory internal research to the corporate spokesperson, but upheld the district court's judgment because "a factfinder could permissibly infer that the speaker harbored specific intent to defraud," or "at least acted with reckless disregard," based on a "pattern of corporate research," "even though the memoranda may or may not have gone directly to the executive who ma[de] the contrary statement." *Id.* at 40a; *see also id.* at 39a (noting that "indirect and circumstantial evidence was sufficient to allow the district court to reasonably infer" intent). And it held that the district court had "also based its holding on [this] proper view of specific intent," *id.* at 41a, simply because the lower court stated that it was "*absurd to believe* that the highly-ranked representatives and agents of these corporations and entities had no knowledge that their public statements were false and fraudulent" since those statements were "inconsistent with the internal knowledge and practice of the *corporation*" that the representatives could "reasonably be *expected*" to be aware of, *id.* at 34a-35a (quoting *id.* at 1890a-91a, 1894a).

There is, however, an obvious, fundamental difference between proclaiming that it is *"absurd to believe"* that Defendants' representatives had no

wrongful intent because they could "*reasonably* be *expected*" to be aware of the allegedly "inconsistent ... knowledge ... of the corporation," and *finding*, based on *evidence*, that they *did* have wrongful intent because they *did* have access to and agreed with contradictory corporate knowledge. There is no difference between *assuming*, based on "permissible inferences," that speakers are aware of, and agree with, internally contradictory information and *imputing* that information to the corporate speaker as a matter of law, under the admittedly erroneous "collective intent" theory. The two standards are different *only* if the district court *makes findings*, based on evidence, that the corporate speakers did possess and agree with the contrary corporate knowledge; it is plainly not enough that the district court "*could* permissibly infer" individual intent. And the district court here plainly did not make any such findings because the government foreswore such findings as "immaterial" and the district court fully agreed that it was sufficient to infer or impute such knowledge to the individual speakers, without engaging in the "insurmountable burden" of such particularized individualized findings.

The D.C. Circuit's embrace of speculative inferences as equivalent to particularized fact-finding about an individual's actual intent is in stark conflict with other circuit's consistent admonition that a "specific corporate employee *must* be *found* to have the [fraudulent] intent." *Dana Corp. v. Blue Cross & Blue Shield Mutual of N. Ohio*, 900 F. 2d 882, 886 n.2 (6th Cir. 1990); *see also Southland Secs. Corp. v. INSpire Ins. Solutions Inc.*, 365 F.3d 353, 366-67 (5th Cir. 2004); *Nordstrom, Inc. v. Chubb & Son, Inc.*, 54 F.3d 1424 (9th Cir. 1995); *Woodmont,*

Inc. v. Daniels, 274 F.2d 132 (10th Cir. 1959). Equally important, it is at war with this Court's First Amendment standards for the proof necessary to satisfy the "reckless disregard" requirement. As *New York Times* stated, "[t]he mere presence of the stories in the files does not, of course, establish that the Times 'knew' the advertisement was false, since the state of mind required for actual malice would have to be brought home to the persons in the Times' organization having responsibility for the publication of the advertisement" at issue. 376 U.S. at 287. It plainly would not suffice to say that the relevant *Times* employees "could reasonably be expected" to know about the numerous "stories in the files," particularly if, as here, the district court had "alternatively" held that such knowledge could be imputed to the responsible person.

In any event, *most* of the alleged "fraud" was statements by the *Tobacco Institute*. Even if it is "reasonable to infer" that executives possess knowledge of *their own* corporation's memoranda, there is no basis (absent findings) to impute such knowledge to the Tobacco Institute, a separate entity, particularly since the district court found that "Defendants never provided the Tobacco Institute with information that nicotine was a drug with a variety of physiological effects and was thought to be responsible for the addictive properties of cigarette smoking." Pet. App. 661a. This simply reflects the district court's bizarre view, undefended by the D.C. Circuit, that specific intent may be inferred from the "[c]ollective [k]nowledge of ... the *[e]nterprise as a [w]hole*." *Id.* at 1979a.

This threat to free speech is particularly obvious and important when the allegedly contrary collective "knowledge" does not concern any *facts* about *internal corporate practices* that the corporation "presumably knows more about than anyone else," *Bose*, 466 U.S. at 504 n.22 (internal quotation marks omitted), but are *opinions* about *public* scientific studies, as with secondhand smoke, or the government's decision to redefine withdrawal symptoms as "addiction." Any credible scientific controversy, by definition, will lead to different opinions about the strength of the evidence, both within and without the corporation, as will semantic arguments about issues like which labels should be affixed to withdrawal symptoms. If the federal courts can simply denominate one side of that internal debate as "corporate knowledge" and thus convert public expressions of the other side into "knowing falsehoods," this necessarily precludes corporations' participation in any public debate. Indeed, the manner in which the courts below analyzed the issues of secondhand smoke and addiction, *see supra* Part II.B.3, vividly illustrate the real risk that their approach to "corporate knowledge" will be used to criminalize opinions or ambiguous statements in the marketplace of ideas.

In any event, and at an absolute minimum, to the extent that the panel actually found *individualized* specific intent, it did so based on a legal theory disavowed by the government before trial and thus in violation of fundamental due process principles. It has long been black-letter law that, "[a]fter bringing and trying the case on [one] theory the plaintiff cannot be permitted ... to change to another which the defendant was not required to meet below."

Virginian Ry. Co. v. Mullens, 271 U.S. 200, 227-28 (1926). "This is essential in order that parties may have the opportunity to offer all the evidence they believe relevant to the issues which the trial tribunal is alone competent to decide ...." *Hormel v. Helvering*, 312 U.S. 552, 556 (1941). "[I]t is equally essential in order that litigants may not be surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence." *Id.*

For example, in *In re Ruffalo*, 390 U.S. 544 (1968), this Court held that a *post hoc* addition of a new charge in an attorney disbarment proceeding violated due process because the defendant "had no notice that [the charge] would be considered a disbarment offense until *after* ... he ... had testified at length on all the material facts pertaining to this phase of the case," even though the facts establishing the violation were supported by the defendant's own testimony at trial. *See id.* at 550-51. If due process requires disregarding even undisputed facts because of the "absence of fair notice," *id.* at 552, it necessarily condemns the lack of notice that tricked Defendants here into putting on no defense on a hotly contested issue.

The cases above simply reflect the truism that defendants cannot defend against claims that were never made; so imposing liability based on a theory affirmatively eschewed by the plaintiff deprives them of their most basic due process rights. Had Defendants in this case been afforded that basic opportunity, they would have shown that all corporate statements accurately reflected the

prevailing internal views—and certainly the speakers' views.

5. Judicial Review: Finally, not only did the panel absolve the government of its burden of proof on materiality and specific intent, *see supra* Parts II.B.2 & 4, it also wholly abandoned its obligation under *Bose* to engage in independent appellate review of the findings that the district court did make. As PM's petition extensively discusses, the panel, notwithstanding the obvious First Amendment implications of the government's fraud allegations in this case and contrary to the decisions of at least three other circuit courts, applied only the highly deferential "clearly erroneous" standard rather than the independent review mandated by *Bose* and its progeny. *Compare* Pet. App. 16a, 28a-29a, 49a, 50a, 52a, *with Byrum v. Landreth*, 566 F.3d 442, 448 n.5 (5th Cir. 2009); *Falanga v. State Bar of Georgia*, 150 F.3d 1333, 1347 (11th Cir. 1998); *Reno v. Disciplinary Bd.*, 106 F.3d 929, 932 (10th Cir. 1997).

III. THE PANEL'S FINDING ON "LIGHTS" DESCRIPTORS CONFLICTS WITH OTHER CIRCUITS AND THIS COURT'S PRECEDENTS

Unlike Defendants' purportedly fraudulent speech discussed above, "lights" descriptors are commercial speech and material. Nonetheless, the fraud findings on this issue conflict with the precedent of other circuits and this Court for three related reasons.

The courts below found that, "*as a result* of ... nicotine-driven behavior" called "compensation," Pet. App. 11a, 972a—*i.e.*, the practice of some smokers to "inhal[e] smoke more deeply" or "smok[e] more cigarettes," *id.* at 10a—cigarettes with less tar under

the Cambridge Filter Method are not actually healthier for smokers who "inhale essentially the same amount of tar and nicotine as they would from full flavor cigarettes," *id.* at 988a. Since such "compensation" eliminates the benefits of lower tar cigarettes as measured by the Cambridge Method,[8] Defendants' *descriptions* of those tar levels were purportedly fraudulent because they "*implied* a health benefit as a result of lower tar levels." *Id.* at 1140. There are three serious errors with the conclusion of the courts below.

First, "low tar" descriptors do not *say* "healthier"; they just accurately say that the cigarette has lower tar under the Cambridge Method. Thus, as discussed above, it conflicted with the law of at least six circuits for the panel to hold that descriptors were fraudulent given semantic ambiguity over whether they imply health benefits: one eminently "reasonable interpretation" of the descriptors is that they are simply an accurate description of cigarettes' relative tar levels as measured by the Cambridge Method. *See supra* at 20 & n.7.

Second, descriptions of the Cambridge tar levels can misleadingly imply health benefits only if the tar levels *themselves* are misleading in this way. But they cannot be deemed misleading because the FTC actively *approved* "'factual statement[s] of the tar and nicotine content' ... as measured by the Cambridge Filter Method," Pet. App. 47a (quoting *Altria Group,*

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[8] There is no dispute that, absent compensation, low-tar cigarettes would be healthier because there is a "dose-response" relationship whereby the less tar and nicotine to which smokers are exposed, the lower the associated risk. Pet. App. 986a; RJR Pet. App. 44a-46a, 47a.

Inc. v. Good, 129 S. Ct. 538, 549 (2008)), through 2008, precisely for the health-related reason of "lead[ing] those smokers who are unable to kick the habit to greater interest in obtaining a low tar and nicotine cigarette," RJR Pet. App. 52a. Obviously, the Cambridge numbers serve no purpose other than "help[ing] smokers make informed decisions" about various cigarettes' health characteristics. *See* Proposal to Rescind FTC Guidance Concerning the Current Cigarette Test Method, 73 Fed. Reg. 40,350, 40,351 (July 14, 2008). The FTC continued this approach well after the "compensation" phenomenon was fully understood by public health agencies and, indeed, was extensively documented in the 2001 National Cancer Institute Report on "Compensation." *See* National Cancer Institute, *Smoking and Tobacco Control Monograph 13* (2001); *see also, e.g.*, National Cancer Institute, *Smoking and Tobacco Control Monograph 7* (1996) (detailing 1994 conference on compensation). The FTC presumably continued this policy because it believed it provided helpful information to smokers who did *not* "compensate," such as some who never smoked full-flavored cigarettes. If it is not fraudulent to provide Cambridge Method ratings (as the FTC directly found), even though the ratings implied health consequences, then it necessarily follows that an accurate description of those tar ratings cannot be deceptive either.

In short, even if Defendants could be convicted of fraud because of what their true statements *implied* under one interpretation of those statements, the implication cannot be fraud if it embodies, at worst, a message specifically approved by the relevant government agency—*i.e.*, that there is a link between

low tar ratings and healthier cigarettes. The D.C. Circuit's contrary conclusion brought it into stark conflict with the Fifth Circuit's square holding that the descriptors "*cannot* constitute fraud" because "cigarettes labeled as 'light' and 'low-tar' do deliver less tar and nicotine as measured by the only government-sanctioned methodology for their measurement." *Brown v. Brown & Williamson Tobacco Corp.*, 479 F.3d 383, 392 (5th Cir. 2007), *abrogated on other grounds by Good*, 129 S. Ct. 538; *see also, e.g., Clinton v. Brown & Williamson Holdings, Inc.*, 498 F. Supp. 2d 639, 652 (S.D.N.Y. 2007).

Indeed, by allowing a fraud finding notwithstanding government *approval* of the information underlying the "fraud," the panel also violated this Court's commercial speech precedents. *Banning* descriptions of the Cambridge ratings cannot "directly and materially" advance a "substantial government interest," because the agency responsible for that "interest" specifically approved giving consumers this information. *Cent. Hudson*, 447 U.S. at 566. Since even *partial* regulatory approval invalidates a commercial speech ban, *a fortiori* the FTC's *complete* approval of the information conveyed by the descriptors forecloses the district court ban. *See Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173, 193-94 (1999) (ban on casino advertising invalid because permitted to Indian tribes); *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 488 (1995) (ban on beer alcohol content disclosures on labels impermissible because permitted in some advertisements); *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 417 (1993).

Finally, the panel's holding is also in stark conflict with this Court's interpretive doctrine that general statutes, like RICO and the fraud statutes, should not be applied to activity regulated by an expert agency under a specific statute if there is a "resulting risk" of "conflicting guidance ... or standards of conduct." *Credit Suisse Securities (USA) LLC v. Billing*, 551 U.S. 264, 275-76 (2007); *see also id.* at 279-81 (precluding application of antitrust law to activity regulated by SEC, even though "SEC ha[d] *disapproved* ... the conduct that the antitrust complaints attack[ed]"); *United States v. National Association of Securities Dealers, Inc.*, 422 U.S. 694, 729-34 (1975) (foreclosing antitrust attack on conduct "ancillary" to that approved by SEC); *Pan American World Airways, Inc. v. United States*, 371 U.S. 296, 309 (1963). This doctrine has been applied to RICO, *see, e.g., Sun City Taxpayers' Ass'n v. Citizens Utilities Co.*, 45 F.3d 58, 61-62 (2d Cir. 1995), and reflects the due process principle that it is impermissible to penalize actions that have been approved by the government, *see, e.g., United States v. Pa. Indus. Chem. Corp.*, 411 U.S. 655, 674 (1973); *Raley v. Ohio*, 360 U.S. 423, 439 (1959); *United States v. Levin*, 973 F.2d 463, 464-66 (6th Cir. 1992) (rejecting mail fraud attack on conduct approved by HHS).

The lower court simply ignored all of this binding precedent because this Court's decision in *Good* purportedly foreclosed such arguments. Pet. App. 46a-47a. But *Good* merely held that *state* law actions against "descriptors" were not facially *preempted* because the FTC never required or approved the *descriptors themselves*. *See Good*, 129 S. Ct. at 549. It in no way denied the obvious truth that the FTC

approved the Cambridge Method ratings being described, or suggested that a description of those non-fraudulent ratings could be deemed fraudulent. Nor does *Good's* finding that the FTC regulatory action failed to *preempt* an *independent* state sovereign suggest that one federal agency could use a general federal statute to advance a fraud theory irreconcilable with the expert independent agency's specific regulatory judgments.

IV. THE "CORRECTIVE STATEMENTS" REMEDY VIOLATES THE FIRST AMENDMENT AND § 1964(A)

Compounding its erroneous decision to permit *enjoining* speech the district court views as "fraudulent," the panel also upheld the requirement that Defendants *promulgate* "corrective" public policy views through a multi-million dollar media campaign in "major newspapers" and a "major television network." Pet. App. 83a. RJR alone plans on spending $25 million for this remedy. As the D.C. Circuit implicitly acknowledged, *see id.* at 84a-88a, all other circuits have limited any "compelled disclosure requirements" to "purely commercial speech," whereby they merely require *disclaimers* to any future *product advertisements* by a defendant. *Riley*, 487 U.S. at 796 n.9; *see, e.g.*, *United States v. Schiff*, 379 F.3d 621, 631 (9th Cir. 2004); *Am. Home Prods. Corp. v. FTC*, 695 F.2d 681, 714 (3d Cir. 1983); *Nat'l Commission on Egg Nutrition v. FTC*, 570 F.2d 157, 164 (7th Cir. 1977). Here, however, the panel required expressions of noncommercial speech in noncommercial fora, regardless of any future advertising (or any use of the enjoined "misleading" statements). This decision is thus in conflict with the

other circuits, particularly the Seventh Circuit's rejection of an order mandating that a trade association issue "corrective" statements, because it "would require [the association] to argue the other side of the controversy [over cholesterol in eggs], thus interfering unnecessarily with the effective presentation of the [association's] pro-egg position." *Egg Nutrition*, 570 F.2d at 164. It also violates this Court's repeated command that the "right to refrain from speaking," *Wooley v. Maynard*, 430 U.S. 705, 714 (1977), stems from the "fixed star in our constitutional constellation ... that no official ... can prescribe what shall be orthodox in ... matters of opinion," *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943), thus rendering government-mandated corrections a particularly disfavored "restraint on the voluntary public expression of ideas," *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n*, 475 U.S. 1, 11 (1986) (internal quotation marks omitted).

Under the D.C. Circuit's unprecedented, far-reaching doctrine, any noncommercial speech concerning any industry or company can be compelled, since all such "corrective" speech would necessarily be designed to be a "burden on defendants' current and future *commercial* speech." Pet. App. 85a.

Moreover, the panel's sole justification for the mandated "corrective statements" is that they will "counteract [the] *anticipated* violations" of the district court's injunction prohibiting future fraudulent statements. *Id.* at 88a. The order is therefore improperly gratuitous under the First Amendment, because there is no basis for *presuming* future

violations of the injunction, particularly since they could occur only in easily detected public statements. It also "reaches beyond the bounds of section 1964(a)" of RICO for the same reason that the *rejected* "public education" remedy does; mandating "corrective" statements, unlike "injunctions," does not "prevent and restrain fraudulent statements" in the future. *Id.* at 97a.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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